84555-7

NO. ~~84764-9~~

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

HOS BROS. CONSTRUCTION, INC.

Appellant,

v.

C19-1 SHOTWELL, LLC, et al.,

Respondents.

RESPONDENT BF-THAR'S OPENING BRIEF

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I. INTRODUCTION

In 1991 and 1992, the legislature substantially revised Washington's mechanics' lien statute. As part of those revisions, it repealed and replaced the requirements for claiming and filing a mechanic's lien. *Compare* RCW 60.04.060 (repealed 1992) (*Appendix A*) *with* RCW 60.04.091 (*Appendix B*). Concerned that the old statutory scheme failed to sufficiently deter improper liens, the new statute "broaden[ed] the significance of the verification statement" and required the claimant to swear under penalty of perjury that the lien was true and correct. *See Lumberman's of Washington, Inc. v. Barnhardt*, 89 Wn. App. 283, 287, 949 P.2d 382, 384 (1997) (discussing revisions).

Consistent with its concern over strict verification, the legislature also required that mechanics' liens "***shall be acknowledged pursuant to chapter 64.08 RCW.***" RCW 60.04.091(2) (emphasis added). Such a requirement "is no mere administrative detail but rather is a fundamental evidentiary matter" given that it "furnishes formal proof of the authenticity of the execution of the instrument." *Kirschbaum v. Wennett*, 806 N.E.2d 440, 446 (Mass. App. 2004) (*quoting McOuatt v. McOuatt*, 320 Mass. 410, 69 N.E.2d 806 (1946). This new requirement brought the lien statute in line with the general acknowledgment requirements for other transfers of interests in real property. *See* RCW 64.04.010; RCW 64.04.020.

Appellant Hos Bros. Construction filed a mechanics' lien

that was not acknowledged. There is no evidence on the face of the lien—or, for that matter, anywhere in the record—that the individual who signed the lien ever acknowledged anything to the notary at execution. Instead, the language Hos used was the "verification upon oath or affirmation" language set forth in RCW 42.44.100(3). That is not an acknowledgment, does not include any of the elements of an acknowledgement, and is certainly not what the legislature intended by explicitly requiring an acknowledgment in its 1991/1992 statutory revisions. As a result, Hos's lien simply did not comply with RCW 60.04.091(2)'s command that liens "shall be acknowledged pursuant to chapter 64.08 RCW." The lien was properly declared invalid by the trial court.

On appeal, Hos asks this Court to ignore the acknowledgement clause. It attempts to manufacture a conflict within the statute to support its request that the Court strike the requirement. Specifically, it claims that the directive conflicts with a sample form of lien. Because it followed the sample lien form, it argues, its lien should be held valid notwithstanding the absence of acknowledgment.

Hos's argument ignores well-established principles of statutory construction. Before a court can invalidate a portion of a statute for non-constitutional reasons, it must attempt to harmonize all provisions so that no portion is rendered a nullity.

Here, the sample form is easily harmonized with the

acknowledgment requirement. The directive that the lien "shall be acknowledged pursuant to chapter 64.08 RCW" sets forth what must be ***appended*** to the sample lien language contained in the statute. The sample lien form was never intended to contain an acknowledgement clause because acknowledgments are not part of the documents they affirm. *See, e.g., Clements v. Snider*, 409 F.2d 549, 550 (9th Cir. 1969) ("The function of the certificate of acknowledgment is to provide *prima facie* proof that a document—***to which it is attached but not a part***—has been executed by the person whose signature appears on the document.") (emphasis added). Of course, the exact form of acknowledgment will vary from mechanic to mechanic depending upon the circumstances (such as whether an individual or corporation is filing the lien, or whether a short form of acknowledgment may be used).

The legislature simply intended that the appropriate acknowledgement clause under RCW 64.08 be appended to the sample lien. This straightforward concept is consistent with sample forms in other statutes, such as those pertaining to deeds, which also require acknowledgment. None of the sample deed forms contains a form of acknowledgment, although it is firmly established that the proper acknowledgment form must be attached to the sample form to create a valid instrument.

The result here is no different, and appropriately harmonizes all clauses in the statute. Hos's alternative—to have

the Court judicially amend the statute to take out what the legislature specifically added in 1991/1992—ignores the separation of powers between the judicial and legislative branches. The statutory directive that a mechanics' lien must be properly acknowledged should be respected.

The trial court properly concluded that a mechanics' lien, to be valid, must be acknowledged. It also properly concluded that an invalid lien cannot be amended into validity after the statutory filing period has run. This Court should affirm the trial court in all respects.

II. STATEMENT OF ISSUES

1. With its 1991/1992 amendments to the Washington's mechanics' liens statute, the legislature mandated that liens, to be valid, "shall be acknowledged pursuant to chapter 64.08 RCW." Hos filed a lien that was not acknowledged. Is Hos's lien valid under Washington's mechanics' lien statute?

2. A party may not amend a mechanics' lien that was never properly created, and was invalid at inception. Hos moved to amend its lien in order to add an acknowledgment clause, and to change other substantive elements of the lien. The trial court denied Hos's motion to amend its lien. Did the trial court abuse its discretion in denying Hos's motion to amend a lien that was never properly created in the first instance?

III. STATEMENT OF THE CASE

A. BankFirst Agrees to Finance $18.6 Million of the Anticipated $24.85 Million Project Costs on Canyon Clock.

This dispute arises out a commercial real estate development project in Frederickson, Washington known as Canyon Clock (the "Project" on the "Property"). The Project was owned by C19-Shotwell and financed by BankFirst. Hos worked on the site for Shotwell.

BankFirst originally agreed to extend either $21.1 million or $18.6 million to Shotwell, depending upon whether Shotwell was able to finalize a pre-sale agreement. Because a pre-sale agreement was not finalized, BankFirst's commitment was contractually set at $18.6 million. CP 315, 317-18, 395-96. Of this total commitment, BankFirst advanced a total of $18,514,140.94. CP 321.

The BankFirst loan closed on September 1, 2006. Its deed of trust was recorded that same day. CP 397, 460. BankFirst advanced a total of $10,350,881.65 at or in connection with closing in order pay off, or refinance, two prior interests on the Property. CP 396-97. Those prior interest holders had recorded their deeds of trust on May 12, 2006 and April 12, 2006, respectively. CP 396, 407, 424.

B. Hos Bros. Was Fully Compensated For All Work Completed Under the First Separate Contract.

Under a contract dated March 11, 2005, it performed certain

"Earthwork," such as excavation and grading of the property. CP 323-40. This contract was completed on March 31, 2006, and Hos was paid in full. CP 344, 537, 541.

C. Commencement of Work On the Second Contract.

After stopping work on the site upon the completion of the first contract, Hos entered into a separate and independent contract with Shotwell on August 7, 2006 (some five months after completing work under the first contract). CP 347-81. Whereas the first contract was just for "earthwork," this second contract was for work as the "general contractor." CP 347. Hos concedes that only the second contract, not the first, is at issue in this case:

> Prior to August 2006, Hos Bros. had already been working on the project several months ***under a separate contract.*** Work under that contract was paid for in full, and is not in dispute.

CP 537, ¶ 7 (emphasis added).

It commenced work on the contract at issue in this litigation in August 2006.[1] CP 5, 384, 388, 390-91, 536-37, 541, 543-44, 547. When it began work under this separate contract, there were two

[1] Work actually should have commenced later, after BankFirst filed its deed of trust, as Hos was required to wait to commence work until it received a "notice to proceed" under its contract. CP 653. Hos, however, jumped the gun and began working on the site without receiving this notice. CP 653-54.

prior recorded interests. CP 396, 407, 424. (It was those interests that BankFirst refinanced with payments totaling $10,350,881.65 when it closed its loan. CP 397.)

D. Hos Files a Mechanics' Lien.

Shotwell ran into financial trouble and failed to pay either Hos or BankFirst. BankFirst declared its loan in default, and stopped advancing funds to Shotwell. (It eventually foreclosed, and purchased the Property at the Trustee's sale. CP 642-47)

Hos, when it was not paid by Shotwell, filed a $771,273.15 lien against the Property on November 30, 2007. CP 28-31. Its claim of lien states, under oath, that the commencement of work was "8/17/06," the day it began work under the second contract. CP 29.

The lien was apparently signed by Mr. Caunt. CP 30. Although the lien states that the lien claimant is "Hos Bros. Construction, Inc.," Mr. Caunt declared that he, individually, was the lien claimant. CP 29-30. In addition, the lien was not acknowledged pursuant to RCW 64.08. CP 30.

E. The Trial Court Holds that Hos's Lien Fails to Comply with the Statutory Acknowledgement Requirement.

Hos filed a complaint to foreclose upon its lien on July 23, 2008 in Pierce County. CP 3-13. Hos's Complaint, like its lien, listed the amount of the lien as $771,273.15 and the date of

commencement as August 17, 2006. CP 5. The litigation proceeded until Shotwell filed for bankruptcy, and the case was transferred to the bankruptcy court. The foreclosure action was subsequently remanded back to Pierce County.

After remand, BF-THAR, LLC, which had acquired the property from BankFirst, moved for summary judgment. CP 14-47, 649-50. BF-THAR argued that Hos's lien was invalid under the mechanics' lien statute because it was not acknowledged, as specifically required by statute. In response, Hos filed a bevy of motions, including a motion to amend its lien to alter the commencement date and amount of lien, and to add an acknowledgment clause. CP 242-50. The trial court ruled that Hos's lien failed to comply with the mechanics' lien statute, and that an invalid lien cannot be amended into validity after the statutory period has run. CP 757-58, 763-67. It invalidated the lien, stayed the remaining elements of the case, and certified its decision for an immediate appeal under CR 54(b). CP 781-90.

IV. ARGUMENT

A. Mechanics' Lien Claimants Must Strictly Comply with the Mechanics' Lien Statute.

When a mechanic's lien is filed, there is no agreement between two parties to transfer any interest in property. Rather, the lien claimant is unilaterally attempting to seize an interest from the property owner. This seizure is only permitted upon strict

fidelity to Washington's mechanics' lien statute:

> [A mechanic's lien] is a creature of statute and is in derogation of the common law. As such, it must be strictly construed to determine whether a lien attaches.
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> * * *
>
> [T]he exact phraseology of the mechanics' lien statute is of utmost importance.

Dean v. McFarland, 81 Wn.2d 215, 219-20, 222, 500 P.2d 1244, 1247-48 (1972).

Hos, citing RCW 60.04.900, argues that the court must apply the statute liberally. Hos Brief., p. 14, n. 62. However, RCW 60.04.900 only provides for a liberal construction once a lien is deemed to have attached. The threshold question—whether a valid lien was created in the first place—is subject to the rule of strict construction. This distinction was recently articulated in *Estate of Haselwood*:

> Mechanic's and materialmen's liens are creatures of statute, in derogation of common law, and therefore must be strictly construed to determine whether a lien attaches. But if it is determined a party's lien is covered by chapter 60.04 RCW, the statute is to be liberally construed to provide security for all parties intended to be protected by its provisions.

Estate of Haselwood v. Bremerton Ice Arena, Inc., 166 Wn.2d 489, 498,

210 P.3d 308, 312 (2009) (citations omitted).[2] This has long been the law in Washington. *Westinghouse Elec. Supply Co. v. Hawthorne*, 21 Wn.2d 74, 77, 150 P.2d 55, 57 (1944) (rule of strict construction applies to determine if lien was created, and only once it is "determined that persons come within the operation of the act it will be liberally applied to them") (*quoting DeGooyer v. Northwest Trust & State Bank*, 130 Wash. 652, 228 P. 835 (1924)).

The burden of proving strict compliance is squarely on the lien clamant, who must "clearly" demonstrate compliance with all the statutory lien requirements. *Dean*, 81 Wn.2d at 220 ("The statutory operation is not to be extended for the benefit of those who do not clearly come within the terms of the statute."); *Lumberman's*, 89 Wn. App. at 286 ("One claiming the benefits of the lien must show he has strictly complied with the provisions of the law that created it.").

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[2] *See also Flag Const. Co., Inc. v. Olympic Blvd. Partners*, 109 Wn. App. 286, 289, 34 P.3d 1250, 1252 (2001) ("And we construe RCW 60.04.091 to provide security for those parties the legislature intended the statute to protect. RCW 60.04.900. But the party claiming the benefits of the lien must strictly comply with the lien claims' law.").

B. Hos Failed to Carry Its Burden of Establishing that Its Lien Strictly Complied with the Mechanics' Lien Statute.

1. Hos's Lien is Invalid Because it was Never Acknowledged.

a. With its 1991/1992 Overhaul of the Mechanics' Lien Statute, the Legislature Made Acknowledgment an Explicit Requirement.

Washington law requires that a mechanic's lien "shall be signed by the claimant or some person authorized to act on his or her behalf . . . and ***shall be acknowledged pursuant to chapter 64.08 RCW.***" RCW 60.04.091(2) (emphasis added). As Hos correctly notes, "Shall is a word of command; it affords a trial court no discretion." Hos Brief, p. 14 (*citing State v. Goins*, 151 Wn.2d 728, 749, 92 P.3d 181, 191 (2004) (Sanders, J., dissenting)).

This explicit acknowledgment requirement did not exist in the predecessor to RCW 60.04.091. *See* RCW 60.04.060 (repealed 1992) (*Appendix A*). Under the prior statute a lien could simply be verified upon oath. *Id.* In 1991 and 1992, however, as part of a wholesale revision of the mechanics' lien statutes, "the Legislature broadened the significance of the verification statement ...." *Lumberman's*, 89 Wn. App. at 287. As part of that process, it specifically required, for the first time, that mechanics' liens be

acknowledged.[3]

Acknowledgement "is no mere administrative detail but rather is a fundamental evidentiary matter, because it 'furnishes formal proof of the authenticity of the execution of the instrument.'" *Kirschbaum*, 806 N.E.2d at 446 (*quoting McOuatt*, 69 N.E.2d 806).[4] *See also* 1A C.J.S., ACKNOWLEDGMENTS, § 2 (2010) (acknowledgement not merely an administrative detail, but serves

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[3] The legislative history enacting this clause indicates that the requirement was a deliberate decision made by the legislature. The original bill out of the Senate contained a sample lien form, but did not contain an acknowledgment requirement. *See* Senate Bill 5497, p. 10 (excerpted in *Appendix C*), Substitute Senate Bill 5497, pp. 11-12 (excerpted in *Appendix D*). The House, however, amended the Senate version to specifically include an acknowledgment requirement, adding the phrase "and shall be acknowledged pursuant to chapter 64.08 RCW." *See* House Committee Amendments to SSB 5497, p. 11 (excerpted in *Appendix E*). The Senate concurred with the House amendment on April 22, 1991, and the bill passed. *See* http://dlr.leg.wa.gov/billsummary/default.aspx?year=1991&bill=5497#history (last visited 12/17/10).

[4] The acknowledgement process formalizes the execution of an instrument, and deters so-called "robo-signers" from casually executing important documents. An acknowledgment ultimately ensures that an instrument was executed according to law, and serves to prevent or deter fraud:

> An acknowledgment gives solemnity to the execution of an instrument, and provides protection against the recording of false instruments. When a notary takes an acknowledgment it says to the world that the execution of the instrument was carried out according to law. An acknowledgment aids in ensuring that the instrument was not fraudulently executed.

1 AM. JUR. 2D, ACKNOWLEDGMENTS, § 2 (2010) (citing cases).

a fundamental evidentiary purpose).

The legislature deliberately, and explicitly, mandated that all mechanics' liens filed after 1991 be acknowledged under chapter 64.08 RCW. This material change in the language of the statute underscores the significance the legislature put on the requirement. *See WR Enterprises, Inc. v. Dep't of Labor & Indus.*, 147 Wn.2d 213, 222, 53 P.3d 504, 508 (2002) ("Further, when a material change is made in the wording of a statute, a change in legislative purpose must be presumed.").

The new requirement is consistent with other revisions made to the mechanics' lien statute in 1991 and 1992. In response to concerns about frivolous and excessive liens, the legislature also enacted a provision concerning improper lien claims. *See* RCW 60.04.081. This new statute provided specific remedies in the event a frivolous lien is filed. Blum, Brian, MECHANICS' AND CONSTRUCTION LIENS IN ALASKA, OREGON AND WASHINGTON, § 6.4, p. 239 (1994) ("[T]he 1991 statute contains a new section that provides a procedure for dismissing frivolous or excessive lien claims."). The new statutory scheme also required the claimant to swear under penalty of perjury that the claim of lien was true and correct, not frivolous, and made with reasonable cause. *Lumberman's*, 89 Wn. App. at 287-88.

The acknowledgment requirement is not only consistent with deterring improper liens, but also gives teeth to, and is a

natural corollary to, the statutory remedies in RCW 60.04.081(4). It does so by requiring a corporation to unambiguously take responsibility for the liens it files (thereby avoiding arguments over whether the specific individual who signed the lien was acting on behalf of, and with authority from, the corporation). The requirement makes corporations who file improper liens accountable.

The acknowledgment requirement for obtaining an interest in property through a lien also brought the mechanics' lien statute in line with the general statutory requirements for acquiring interests in real property. *See* RCW 64.04.010 (requiring that "[e]very conveyance of real estate, or any interest therein, and every contract creating or evidencing any encumbrance upon real estate" must be by deed); RCW 64.04.020 ("Every deed shall be in writing, signed by the party bound thereby, and acknowledged by the party before some person authorized by this act to take acknowledgments of deeds.").[5] In Washington, the acquisition of

[5] Following this legislative mandate, the Washington courts have long invalidated property transfers that were not properly acknowledged. *See, e.g., Anderson v. Frye & Bruhn*, 69 Wash. 89, 92, 124 P. 499, 500 (1912) ("this court has declined to recognize the validity of leases and agreements for leases of real property for a period exceeding one year . . . when they are not acknowledged."); *Ben Holt Indus., Inc. v. Milne*, 36 Wn. App. 468, 472-73, 675 P.2d 1256, 1259 (1984) (lease invalidated because of defective acknowledgment).

an interest in real property, whether by lease, lien or deed, must be by an instrument that is acknowledged.

b. An Oath or Affirmation is Not an Acknowledgement.

"[C]hapter 64.08 RCW" provides two forms of acknowledgment, one for individuals and one for corporations. *See* RCW 64.08.070 (corporations); RCW 64.08.060 (individuals). Each of these statutes, in turn, also permits acknowledgment under a "short form." RCW 64.08.070 (after December 31, 1985, an acknowledgment under RCW 42.44.100(2) is sufficient); RCW 64.08.060 (after December 31, 1985, an acknowledgment under RCW 42.44.100(1) is sufficient).

Throughout its brief, Hos refers to the "subscribed and sworn" clause in its lien as a type of "acknowledgment." *See, e.g.*, Hos Brief, pp. 4-5 (referring to "notary's certificate of acknowledgment"). It is not. An acknowledgment, whether for an individual or a corporation, is statutorily different than a notary's verification upon oath or affirmation. Washington law never defines the "subscribed and sworn" clause as a form of acknowledgment. *Compare* RCW 64.08.070, RCW 64.08.060, RCW 42.44.100(1), and RCW 42.44.100(2) (language specifically identified as forms of "acknowledgment") *with* RCW 42.44.100(3) (language which is not identified as a form of acknowledgment, but merely a form for "verification upon oath or affirmation").

Acknowledgments require that a person—the notary—certify that the person signing the document is known (or verified upon satisfactory evidence) and that the signor, in the presence of the notary, affirmatively acknowledged that the document was his or her free and voluntary act for the uses and purposes set forth in the document. RCW 42.44.100(1); RCW 64.08.060. *See generally*, 1A C.J.S., ACKNOWLEDGMENTS, § 1 ("An acknowledgement consists of an oral declaration by the signer of the document and a written certificate prepared by a public official, generally a notary public.")

Corporate acknowledgments require more. When a document is signed on behalf of a corporation, the notary must also state that the signor is known (or verified upon satisfactory evidence) to be a representative of the corporation, that the signing is a free and voluntary act of the corporation, and that the signor is authorized to execute the document on behalf of the corporation. RCW 42.44.100(2); RCW 64.08.070. *See also Yukon Investments Co. v. Crescent Meat Co.*, 140 Wash. 136, 139, 248 P. 377, 378 (1926) (stating elements); *Bradley v. Seattle First Nat'l Bank*, 34 Wn.2d 63, 66, 208 P.2d 141, 142 (1949) (restating elements, but dropping requirement of corporate seal).

In contrast, "a verification upon oath or affirmation"—which is ***not*** defined or identified as an "acknowledgment" by statute—mandates none of these elements. It merely requires that the notary use the following language:

Signed and sworn to (or affirmed) before me on (date) by (name of person making statement).

RCW 42.44.100(3).

c. Hos's Lien was Not Acknowledged.

Hos's attempt to acquire an interest in the Property under a lien that only contains a notarial oath or affirmation is invalid. With the repeal and replacement of the old statute, the legislature has specifically required mechanics' liens to be ***acknowledged***, *e.g.*, to contain all of the elements set forth in the statute. The notarial oath used by Hos does not meet the requirements for either the individual or the corporate form of acknowledgment. Hos's lien was not, under any form, acknowledged.

Hos, citing a decision from Division I, argues that its notarial oath was close enough to meet the statutory requirements. Hos Brief, p. 24 (citing *Fircrest Supply, Inc. v. Plummer*, 30 Wn. App. 384, 634 P.2d 891 (1981)). In *Fircrest*, the court concluded that misplaced signatures on a lien were "little more than a scrivener's error" and that, because the lien as a whole contained the necessary elements, it was still proper. *Id.* at 391.

Fircrest is easily distinguishable. The statute at issue in *Fircrest* was the predecessor to RCW 60.04.091. *Id.* at 387. It did not require, as the current statute does, that the lien be specifically acknowledged pursuant to RCW 64.08. Unlike *Fircrest*, this is not a case where the signatures were in the wrong places, but the lien, as

a whole, otherwise established all of the requisite elements to render it valid. Rather, Hos's lien is utterly devoid of any acknowledgment, individual or corporate. As the legislature explicitly required a mechanic's lien to contain an acknowledgment, Hos's lien cannot be held to be valid unless the legislature's specific directive that such liens "shall be acknowledged pursuant to chapter 64.08 RCW" is ignored.

2. Hos's Lien is Also Defective Because it Does Not Contain Any of the Requisite Elements Necessary for a Corporate Acknowledgment.

Hos, the lien claimant, is a corporation. CP 29. As such, it was required to use the corporate form of acknowledgement set forth in RCW 64.08.070 (or RCW 42.44.100(2)). The failure to do so renders the acknowledgement invalid. *Ben Holt*, 36 Wn. App. at 472-73; Gillman, Richard, WEST'S LEGAL FORMS, § 1:378 (2009) ("The use of an individual form for corporate acknowledgment renders the acknowledgment invalid.").

Citing *Kley*, Hos argues that a "certificate of acknowledgment for a corporation need not be *identical* to RCW 64.08.070 for a document to be 'acknowledged pursuant to' that statute." Hos Brief, p. 19 (citing *Kley v. Geiger*, 4 Wash. 484, 30 P. 727 (1892)). True enough. But a corporate acknowledgment, in whatever form, must still affirmatively indicate, *inter alia*, that the signor acknowledged, before the notary, that (1) he or she is

authorized by the corporation to execute the document and (2) the act is a free and voluntary act of the corporation. The court in *Yukon Inv. Co.* set forth the required elements for a corporate acknowledgment:

> The acknowledgment appears to be fatally defective. The statute ... provides a form of acknowledgment for corporations. The form used in this case was that commonly provided for individuals, and lacks ***four essential elements of the statutory form for corporations***: (1) fails to show that the person signing the mortgage was known to the notary to be an officer of the corporation which executed the mortgage; (2) that he acknowledged the same to be the free and voluntary act of the corporation; (3) that he was authorized to execute it on behalf of the corporation; and (4) that the seal affixed was the corporate seal.

Yukon, 140 Wash. at 139 (emphasis added). The first three elements are mandatory. *Bradley*, 34 Wn.2d at 67; *Ben Holt*, 36 Wn. App. at 472 ("*Bradley* merely dropped the requirement of a corporate seal," but all the other elements are still required for valid corporate acknowledgment).

As the court subsequently noted in *Kelpine Products*, each element must be acknowledged before the notary, and such acknowledgment must then be set forth on the face of the document. If one or more of the elements are missing, then there is no substantial compliance and the document is invalid:

> While the acknowledgment in that case [*Yukon*] was defective in four particulars, and here in only two, the result must be the same. The statute is not satisfied with less than substantial compliance in ***all*** respects prescribed.

Bank of Commerce of Anacortes v. Kelpine Products Co., 167 Wash. 592, 595-96, 10 P.2d 238, 239 (1932) (emphasis added). *See also Ben Holt*, 36 Wn. App. at 472 ("The 'substantial compliance' required by *Yukon* and *Kelpine Products* dictates that the elements be in writing, affixed to the instrument.").

Here, elements 2 and 3 are indisputably absent in Hos's lien.

a. Essential Element 3 is Absent: Hos's Lien is Defective Because It Fails to Show, on its Face, that John W. Caunt Was Authorized to Sign the Lien.

In Hos's claim of lien, John W. Caunt declares, "I am the claimant above named," when the actual claimant is "Hos Bros. Construction, Inc." CP 29-30. As a result, he never declares that he is acting on behalf of, and with the authority of, Hos.[6] CP 30.

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[6] At most, Mr. Caunt identified himself by using the title "President" on the lien. The inclusion of a title after a signature, however, is merely descriptive. It neither turns the signature into a corporate act nor sets forth the authority of the signor. *Griffin v. Union Sav. & Trust Co.*, 86 Wash. 605, 609-11, 150 P.1128, 1130 (1915) ("when words which may be either descriptive of the person, or indicative of the character in which a person contracts, are affixed to the name of a contracting party, *prima facie*, they are descriptive of the person only . . ."). The signor may overcome that presumption, but he or she must first submit parol evidence to do so. *Wilson Court Ltd. Partnership v. Tony Maroni's, Inc.*, 134 Wn.2d 692, 700, 952 P.2d 590, 594-95 (1998). Because parol evidence defeats the self-authenticating function of an acknowledgement clause,

When a corporation asserts a lien, a statement of authority is required under the mechanics' lien statute by virtue of both (1) the requirement that liens be acknowledged pursuant to chapter 64.08 RCW, and (2) the language of the sample form itself. *See* RCW 64.08.070 (requirement that signor "on oath state[ ] that he was authorized to execute said instrument"); RCW 42.44.100(2) (signor "on oath stated that (he/she) was authorized to execute the instrument"); RCW 60.04.091(2) (sample: "I am the claimant (or attorney of the claimant, or administrator, representative, or agent of the trustees of an employee benefit plan) above named").

The lack of any statement of authority is a fatal defect:

> By the certificate of the notary public in this case it appears that the acknowledgment was made by one purporting to be the president of the corporation, mortgagor. ***The certificate contains no statement whatever as to whether such officer of the corporation stated on oath 'that he was authorized to execute said instrument' . . . . These requirements are substantial and essential, being prescribed by statute, and there was no attempt to substantially, or otherwise, comply with them.***

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such evidence is never permitted to prove the validity of a lien. *Ben Holt*, 36 Wn. App. at 472 (document signed by "Ben Holt President" not a sufficient acknowledgment, and parol evidence of corporate authority excluded). In any event, there is not a shred of evidence in the record-from Mr. Caunt, Ms. Meadows (the notary) or anyone else—that establishes Mr. Caunt's authority to execute the lien on behalf of Hos.

* * *

> "He [the signor] must swear that he had authority to execute the particular instrument he acknowledges. ***He is not the corporation, nor has he power to do all the things it might do. Whether the corporation itself authorized the execution of the particular instrument is a vital matter, and he is required to swear that it did.***"

Kelpine Products, 167 Wash. at 595 (*quoting Clarksburg Casket Co. v. Valley Undertaking Co.*, 81 W. Va. 212, 94 S.E. 549 (1917)) (emphasis added). *See also Ben Holt*, 36 Wn. App. at 471-72.

Here, as in *Kelpine Products* and *Ben Holt*, Mr. Caunt never swore or acknowledged before the notary "that he had the authority to execute" the lien. Because Mr. Caunt indicated that he was the lien claimant, he never even stated that he had authority in his verification statement. These are fatal omissions, and Hos's lien is invalid. *See Kelpine Products* , 167 Wash. at 595; *Ben Holt*, 36 Wn. App. at 472.

b. Essential Element 2 is Absent: Hos's Lien is Defective Because it Fails to Show, on its Face, That the Assertion of a Lien Was an Authorized Corporate Act.

In addition to acknowledging that he had the authority to act on behalf of Hos, Mr. Caunt was additionally required to acknowledge that the lien was authorized by Hos. *See* RCW 64.08.070 (requirement that signor "acknowledge[ ] said instrument

to be the free and voluntary act and deed of said corporation, for the uses and purposes therein mentioned"); RCW 42.44.100(2) (signor must "acknowledge[ ] it as the (type of authority, *e.g.*, officer, trustee, etc.) of (name of party on behalf of whom instrument was executed) to be the free and voluntary act of such party for the uses and purposes mentioned in the instrument"). This required acknowledgment does not appear anywhere on Hos's lien. Nor does it appear anywhere in the record: there is no evidence from Mr. Caunt, Ms. Meadows (the notary) or anyone else that this acknowledgment ever in fact took place.

The failure to acknowledge that the execution of the lien is an authorized act of the corporation renders the lien fatally defective. *Kelpine Products* , 167 Wash. at 595; *Yukon Inv. Co.*, 140 Wash. at 139; *Ben Holt*, 36 Wn. App. at 472-73.

Put simply, Hos's lien, while perhaps verified under RCW 42.44.100(3), is not acknowledged as required in the 1991/1992 amendments to the mechanics' lien statute. There is no indication on the face of the lien that Mr. Caunt was authorized to sign the lien, or that it was an authorized act of the corporation. (Nor is there any evidence that Mr. Caunt orally made these statements to the notary at the time the lien was executed.) These are not the types of minor differences in semantics that are permitted under *Kley*. Rather, they are fatal deficiencies which violate the *sine qua non* of an acknowledgment, and do not come close to meeting the

explicit legislative directive that all liens "shall be acknowledged pursuant to chapter 64.08 RCW."

c. Hos is the Lien Claimant, and It was Required to Use the Corporate Form.

Finally, Hos makes the peculiar argument that because Mr. Caunt was signing as an individual, "Hos was not executing the verification clause—Mr. Caunt was." Hos Brief, p. 24, n. 88. *See also id.*, pp. 21-22 (arguing that "no corporate agent" was "executing the lien on behalf of the claimant" and that Mr. Caunt "signed in his own capacity"). However, Mr. Caunt, in his individual capacity, has no lien against the Property. His statement on the lien that he "is the lien claimant" is just wrong, as Hos concedes. Hos Brief, p. 10 ("The verification clause, however, erroneously identified Mr. Caunt as the 'lien claimant' . . .").

Hos, as a corporation, can only act through its agents. As the corporation cannot physically execute documents, it relies upon its agents to do so. Here, it is undisputed that Hos was the lien claimant. As such, the person who physically signed the lien was required to acknowledge, at the time of execution, that he was authorized to do so, and that creating the lien was an authorized act of the corporation. If it is not an authorized act of the corporation, or if the signor has no authority to sign, then Hos has no lien. These facts must exist on the face of the lien—that is the whole point of requiring an instrument to be acknowledged, and

that is what is utterly absent from Hos's lien here.

In *Ben Holt*, for example, "Ben Holt Industries, Inc." attempted to enter into a lease with the defendants. The lease was signed by "Ben Holt President" and "Venda Holt Secretary." *Ben Holt*, 36 Wn. App. at 469. The notary, however, signed an individual acknowledgement clause rather than the corporate clause. *Id.* As a result, the lease was held to be invalid because it failed to show that (1) the person signing it ("Ben Holt President") was known by the notary to be an officer of the corporation, (2) the execution of the instrument was a free and voluntary act of the corporation, and (3) the signor was authorized by the corporation to sign the lease. *Id.* at 470-72.

Here, Mr. Caunt, like Mr. Holt, signed the instrument at issue. Like Mr. Holt, Mr. Caunt listed his title, "President," after his name. And like Mr. Holt, Mr. Caunt's signature was not acknowledged using the corporate form. (While Mr. Holt at least used the individual acknowledgement form, Mr. Caunt failed to use any acknowledgment form.) Just as the lease was invalid in *Ben Holt*, the lien is invalid here.

Hos attempts to distinguish *Ben Holt* by arguing that because the lien statute permits a lien to be executed by an authorized representative, it is somehow different from the lease requirement that the corporation sign the document. Hos Brief, pp. 22-23 ("But no statute in Ben Holt said that the corporation *or some person*

authorized to act on its behalf could execute the document—only the corporation itself could execute the lease in Ben Holt. . . . . Ben Holt would be analogous if RCW 60.04.091 said only the *lien claimant* can sign the claim of lien.") (italics in original).

This is a distinction without a difference. Because corporations cannot physically sign leases, every lease entered into by a corporation is necessarily executed by a person acting on its behalf. When a corporation enters into a lease, just as when it executes a lien, the person signing the instrument on behalf of the corporation must acknowledge he or she has the authority to do so, and that the act is a free and voluntary act of the corporation. That is how the corporation becomes bound and is ultimately held accountable for the action. These requisite elements are admittedly absent here, and their absence is fatal to Hos's claim of lien.

C. The Statutory Phrase "*shall be acknowledged pursuant to chapter 64.08 RCW*" Should Not Be Read Out of the Statute.

The statute unambiguously requires acknowledgment. Faced with the reality that its lien is not acknowledged, Hos asks this Court to nullify the clause "shall be acknowledged pursuant to chapter 64.08 RCW," arguing that it followed the "sample" lien form contained in the statute (which it rhetorically, but

inaccurately, characterizes as a "safe harbor.")[7]

Hos therefore manufactures an internal conflict in the statute. In order to have the Court invalidate the express requirement that an acknowledgment must be made pursuant to RCW 64.08, it argues that the phrase "[a] claim of lien substantially in the following form shall be sufficient" conflicts with the phrase "shall be acknowledged pursuant to chapter 64.08 RCW." It effectively wants the Court strike the clause "shall be acknowledged pursuant to chapter 64.08 RCW" from the statute.[8]

But this invitation to selective judicial statutory draftsmanship ignores fundamental principles of statutory construction. Statutes "must be interpreted and construed so that

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[7] A "safe harbor" provision provides specific and explicit protection from liability or penalty if its provisions are followed. *See, e.g.*, http://en.wiktionary.org/wiki/safe_harbor (last visited 12/13/10). The section cited by Hos is nothing more than a sample form.

[8] Hos never explains exactly why the acknowledgement requirement should be the clause omitted in the event of a conflict. Even if the two clauses cannot be harmonized—and they can—the solution is not to eliminate the more explicit requirement of acknowledgment. *See Tunstall ex rel. Tunstall v. Bergeson*, 141 Wn.2d 201, 211, 5 P.3d 691, 697 (2000) (more specific and more recent statute given precedence in statutory interpretation); *In re Estate of Little*, 106 Wn.2d 269, 283, 721 P.2d 950 (1986) (more specific statute given precedence). Not only is the acknowledgment directive more explicit than the sample form, it is also the more recent addition to the language. *See* fn. 3, *supra*. *See also Appendix A*, pp. 10-11 (original language, with sample form but without acknowledgment requirement), *Appendix E*, pp. 11-12 (amended language adding acknowledgment requirement).

all the language used is given effect, with no portion rendered meaningless or superfluous." *Gorman v. Garlock, Inc.*, 155 Wn.2d 198, 210, 118 P.3d 311, 318 (2005). The language of statutes must be harmonized and read in such a way as to give force and effect to all provisions. *Id.* ("apparently conflicting statutes must be reconciled to give effect to each of them").

This rule is has added force when the allegedly conflicting language is contained not in two different statutes, but within the same statute. *Rosenoff v. Cross*, 95 Wash. 525, 531, 164 P. 236, 239 (1917) ("The courts will not so construe different provisions of the law as to create a conflict when any other course is reasonably possible."); *State v. Draxinger*, 148 Wn. App. 533, 537, 200 P.3d 251, 253 (2008) ("Where there is an apparent inconsistency, the statute must be read to maintain the integrity of each provision, if possible.").

Consequently, a court is justified in nullifying a provision of a statute on non-constitutional grounds only when it is literally impossible to harmonize the provisions:

> Only when portions of an act are so inconsistent with each other that to give effect to one renders the other nugatory is the court justified in saying which shall stand and which shall fall

Booth Fisheries Corp. v. Case, 182 Wash. 392, 396, 47 P.2d 834, 835 (1935).

Here, the two allegedly conflicting parts of the statue are easily harmonized. The express requirement that the form of lien "shall be acknowledged pursuant to chapter 64.08 RCW" sets forth ***what must be appended to the sample lien language contained in the statute.*** As the Ninth Circuit explained, acknowledgments are not part of the document they acknowledge:

> The function of the certificate of acknowledgment is to provide *prima facie* proof that a document—***to which it is attached but not a part***—has been executed by the person whose signature appears on the document. The certificate is 'evidentiary in character and is required so as to entitle the instrument to be recorded or to render it competent evidence without further proof.'

Clements, 409 F.2d at 550 (citation omitted).

An acknowledgment is an ***additional*** requirement necessary to create a valid lien, just as the other requirements contained in subsections (1)(a)-(f) of the statute are additional elements that must also be contained in the lien (and are not contained in the sample form).

The sample lien language was never intended to include the

required acknowledgment language.[9] The plain language preceding the sample form makes it clear that it is doing nothing more that setting forth an example lien. RCW 60.04.091(2) ("A *claim of lien* in the following form . . .") (emphasis added). It simply does not purport to set forth an example lien "with an acknowledgment clause."

The legislature's decision to not include acknowledgment language in the sample form is not surprising. In similar statutes, such as those relating to deeds, the legislature also set forth sample forms without including any acknowledgment language.[10] *See* RCW 64.04.030 (warranty deed form); RCW 64.04.040 (bargain and sale deed form); RCW 64.04.050 (quitclaim deed).

All of these statutes provide that the described deed "may

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[9] The proper form of acknowledgement will differ depending upon whether a long or short form is used, and whether an individual or corporate acknowledgement is necessary. Including all such potential forms of acknowledgment would defeat the purpose of setting forth a sample lien form, with an explicit reference to the statutory scheme which directs which form of acknowledgement should then be attached to the lien.

[10] Reference to other statutes addressing similar principles is instructive:

> The plain meaning of a statute may be discerned "from all that the Legislature has said in the statute and related statutes which disclose legislative intent about the provision in question."

Rabanco Ltd. v. King County, 125 Wn. App. 794, 800, 106 P.3d 802, 805 (2005) (*quoting Campbell*, 146 Wn.2d at 11, 43 P.3d 4).

be substantially in the following form" or "may be in substance in the following form." However, *none* of these sample forms contains an acknowledgement clause. It cannot seriously be argued that a deed that simply follows the statutory form, without an acknowledgment clause required by RCW 64.04.020, is valid. *See, e.g.*, RCW 64.04.020; *Anderson*, 69 Wash. at 92; *Saunders v. Callaway*, 42 Wn. App. 29, 35-36, 708 P.2d 652, 656 (1985); *Ben Holt*, 36 Wn. App. at 472-73. Yet that is exactly what Hos argues here, in the context of the mechanics' lien statute.

When the legislature sets forth a sample form and additionally indicates that the form must be acknowledged, it is understood that the acknowledgment must be attached to, and follow, the sample form. That is how an acknowledgment clause functions. *Clements*, 409 F.2d at 550.

This construction—that the acknowledgment clause must be appended to the lien—harmonizes the allegedly conflicting provisions of the statute, is consistent with the statutory scheme concerning other interests in real property, and gives meaning to the legislature's unambiguous and specific direction that a claim of lien "shall be acknowledged pursuant to chapter 64.08 RCW."

D. *Williams v. Athletic Field* Was Properly Decided.

In a decision currently under review, Division II of the Court of Appeals invalidated a lien because it was not properly

acknowledged. *Williams v. Athletic Field, Inc.*, 155 Wn. App. 434, 445, 228 P.3d 1297, 1303, *review granted*, 169 Wn.2d 1021, 238 P.3d 504 (2010).

In *Williams*—as in this case—the lien at issue failed to contain an acknowledgement clause and contained only the "subscribed and sworn" clause. *Id.* at 437. The Court of Appeals, citing the statutory requirement that liens "shall be acknowledged pursuant to chapter 64.08 RCW," held:

> This attestation clause fails to substantially comply with the forms provided in RCW 64.08.070 and RCW 42.44.100 because it does not indicate that Southern signed in a representative capacity on behalf of LienData. The acknowledgment stated only, "SUBSCRIBED AND SWORN to before me this 1st day of December, 2004," followed by the signature, name, and title of the notary public and the date on which her commission expires. At best, this acknowledgment only satisfies the short form requirements for witnessing a signature set forth in RCW 42.44.100(4). It does not satisfy the more complex requirements of corporate acknowledgment.

Williams, 155 Wn. App. at 443-44. Included in those "more complex requirements" are the necessary statements relating to authority and corporate authorization. *Id* at 444.

The *Williams* court also specifically—and correctly— rejected the argument that the sample form, without an acknowledgment form appended to it, was sufficient under the statute:

> But to establish that the claim of lien was properly acknowledged, RCW 60.04.091(2) requires compliance with chapter 64.08 RCW. Where corporate acknowledgment is required, the sample form cannot be sufficient because it only satisfies the requirements to witness an individual signature.

Williams, 155 Wn. App. at 445.

The holding of *Williams* flows directly from the statutory requirement that the liens must be appropriately acknowledged. The holding appropriately gives meaning to all clauses of the statute, nullifying none. It appropriately harmonizes the requirement of acknowledgement with the sample form. It recognizes that Washington courts have long held that the failure to use the proper acknowledgement form will invalidate an instrument. *See, e.g., Flag Const. Co., Inc.*, 109 Wn. App. at 290 (mechanic's lien invalidated because the notary form was incorrect); *Ben Holt*, 36 Wn. App. at 472-73 (invalidating lease because it was acknowledged using individual rather that corporate form). *Williams* was correctly decided, and provides additional support for the trial court's decision to invalidate Hos's lien here.

E. Hos's Invalid Lien May Not Be Amended Into Validity After the Statutory Period Has Run.

Consistent with the rule of strict construction, a lien claimant who fails to strictly comply with the statutory requirements does not get a "do-over." It is improper to allow the claimant to submit

after-the-fact evidence to rectify deficiencies, such as a defective acknowledgment. *Smith v. Allen*, 78 Wash. 135, 138 P. 683 (1914) (parol evidence cannot be offered to prove acknowledgment); *Forrester v. Reliable Transfer Co.*, 59 Wash. 86, 95, 109 P. 312 (1910) (parol evidence or evidence other than the acknowledgment itself is inadmissible to prove acknowledgment); *Ben Holt*, 36 Wn. App. at 472 ("Generally, a defective acknowledgment may not be 'perfected' by parol evidence.").

Nor can a lien claimant simply "amend" an invalid lien by belatedly adding an acknowledgment clause.[11] The reason is simple: an amendment cannot resurrect an otherwise void lien into a valid one:

> The statutes simply mean that defects which do not go to the substance of the lien may be amended as pleadings may be amended, but ***this does not mean that a void notice of lien may be filed out of time and thus be amended so as to make a valid lien.***

McMullen & Co. v. Croft, 96 Wash. 275, 279, 164 P. 930, 932 (1917). *See also Intermountain Elec., Inc. v. G-A-T Bros. Const., Inc.*, 115 Wn.

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[11] If a mechanic files a new or amended lien within the statutory 90-day period after work was completed, then the "amended" lien is treated as a new lien that may be enforced. Blum, Brian, MECHANICS' AND CONSTRUCTION LIENS IN ALASKA, OREGON AND WASHINGTON, § 6.4, p. 239 (1994). This option is not available to Hos, which concluded work on the Property far more than 90 days before it sought to amend its lien.

App. 384, 395, 62 P.3d 548, 553 (2003) (same); *Lumberman's*, 89 Wn. App. at 291 (same); 33 WASH. PRAC., WASH. CONSTRUCTION LAW MANUAL, § 14:22 (2010-2011 ed.) ("a lien claim cannot be amended to rectify an invalid lien claim").[12]

In *Lumberman's*, a mechanic's lien claimant sought leave of court to amend its lien to add a proper verification clause. However, because the mechanic's lien was invalid without the proper verification clause, the court ruled that it could not be amended to "cure" that defect:

> We hold that the trial court did not err when it

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[12] This rule is not unique to Washington State. *See, e.g., In re: Mahan & Rowsey, Inc.*, 27 B.R. 883, 887 (W.D. Okl. 1983) ("Failing to conform to the requirements of [Oklahoma's mechanics' lien statute], [mechanic] may not convincingly argue that perfection of the lien is available by amendment."); *Bridge View Tower, LLC v. Roco G.C. Corp.*, 69 A.D.3d 711, 712-13, 892 N.Y.S.2d 520, 521 (N.Y. App. Div. 2010) (invalid lien may not be amended to "revive an invalid notice of lien"); *State ex rel. Springfield Underground, Inc. v. Sweeney*, 102 S.W.3d 7, 10 (Mo. 2003) (wholly defective lien may not be amended); *National Restoration Co. v. Merit General Contractors, Inc.*, 208 P.3d 755, 762-64 (Kansas App. 2008) (where "lien statement was vitally defective when filed" and contractor "failed to move to amend its lien statement" within the statutory period for filing a lien, lien was invalid and could not be cured by amendment); *Tradesmen Inter'l Inc. v. Wal-Mart Real Estate Business Trust*, 129 P.3d 102, 110 (Kansas App. 2006) (Mechanics' lien statute "does not permit 'amendment of a vitally defective lien statement after the statutory period in which to file such lien has expired.'") (citation omitted); *Halsey v. Pat Reichenberger Lumber, Inc.*, 621 P.2d 1021, 1023 (Kansas App. 1981) ("The court has consistently held that a mechanic's lien is not valid without a proper verification . . . . Thus, the lien statement was vitally defective when filed, and it cannot now be amended to permit its verification.").

> concluded that *an invalid claim of lien could not be amended by Lumbermen's to make it valid after the statutory period had passed.* This also applies to RCW 60.04.091(2), which provides for amendment to a claim of lien by court order.
>
> * * *
>
> *The trial court did not err when it concluded that the original claim of lien could not be amended, either by Lumbermen's or by order of the court, because the original claim was invalid and thus did not commence the foreclosure action before the 90-day time period for filing claims had expired.*

Lumberman's, 89 Wn. App. at 291 (emphasis added).

In *Intermountain Elec.*, a mechanic filed a new lien after its first lien was held invalid. Whether treated as a new lien or an attempt to amend the invalid lien, the result was the same:

> Once a lien is declared invalid and the 90-day filing period has run, the lien cannot be amended so as to make it valid

Intermountain Elec., 115 Wash. App. at 395.

Hos argues that it should be permitted to amend its lien to add an acknowledgement clause because it "substantially complied" with the lien statute. Hos Brief, p. 31. This is the wrong standard. Hos is required to prove that it ***strictly*** complied with the mechanics' lien statute. *Estate of Haselwood*, 166 Wn.2d at 498. *See generally* Section IV, A, *supra*.

Moreover, the failure to include an acknowledgment clause,

when one is demanded by statute, does not constitute "substantial compliance" anyway. *Yukon*, 140 Wash. at 139; *Kelpine Products* , 167 Wash. at 595-96; *Ben Holt*, 36 Wn. App. at 472 ("The 'substantial compliance' required by *Yukon* and *Kelpine Products* dictates that the elements be in writing, affixed to the instrument.").

Hos's citation of a series of turn-of-the-century cases (all decided before the Court clarified that the strict construction standard applies to mechanics' liens) does not change this result. Hos Brief, pp. 27-30 (*citing Davidson v. National Can Co.*, 150 Wash. 370, 273 P. 185 (1928), *Sullivan v. Treen*, 13 Wash. 261, 43 P. 38 (1895) and *Stetson & Post Lumber Co. v. W. & J. Sloane Co.*, 61 Wash. 180, 112 P. 248 (1910)).

In *Davidson*, the court concluded that a lien was valid despite the omission of an impressed notarial seal on the document. It did so because, due to an amendment to prior law, "no suggestion of a need for impressing the notarial seal on the jurat" was present in the new statute. *Davidson*, 150 Wash. at 374 (emphasis added). In so holding, the court contrasted its decision with decisions under the prior statute, which specifically required a notarial seal:

> It would seem that the ruling of the trial court was based upon the early case of *Gates v. Brown*, 1 Wash. 470, 25 P. 914, and *Stetson & Post Mill Co. v. McDonald*, 5 Wash. 496, 32 P. 108. Those cases do undoubtedly hold that the omission of the notary's seal is fatal, but those cases were both written when the territorial

> laws with reference to liens and lien notices were still in full force and effect. *Immediately following the decision in the McDonald Case the Legislature of 1893, apparently for the very purpose of avoiding the hardships of the rule announced, enacted a new and comprehensive act entitled 'An Act creating and providing for enforcement of liens for labor and material,' which entirely superseded the laws in force when the decisions just cited were written.*

Id. at 373-74. (emphasis added).

Davidson therefore stands for the unremarkable proposition that the statutory requirements control the question of whether a lien is valid. Because the statute in *Davidson* did not require an impressed notarial seal on the jurat, the failure to have such a seal did not render the document void.

In *Sullivan*, the court permitted an amendment to a verification clause where the notary failed to list his place of residence on the form. *Sullivan*, 13 Wash. at 261. There, of course, allowing an amendment did not undermine any legislative directive or explicit lien requirement. The notary clearly signed the form, and fully complied with the legislature's intent in requiring that a lien have an oath or affirmation under that statute. *Id.* at 261. That is not true in Hos's case, in which essential and required elements were missing from the lien.

Finally, in *Stetson & Post*, a lien claimant was permitted to amend an otherwise proper lien to name a leasehold interest. There

was no argument that the lien was improper as originally filed, or that it was improperly verified, executed or notarized. *Stetson & Post*, 61 Wash. at 181. The case involved an amendment of an otherwise valid lien, not an attempt to amend an invalid lien into validity. It has no application here.

An amendment only permits a party to modify an otherwise valid lien. It does not allow a party to resurrect a dead lien. Hos cannot cure its defective lien by belatedly seeking leave to amend the lien to add an acknowledgment clause.

F. Amendment of Hos's Lien would be Futile Because Hos Cannot Backdate Its Commencement Date to Cover Work Performed Under an Earlier, Completed, and Independent Contract.

Even if Hos lien was valid—and it is not—its proposed amendment is not permitted because Hos may not, as a matter of law, backdate the work commencement date.

When Hos originally filed this litigation, it took the position, under oath, that the relevant commencement of work date for its lien was August 2006. CP 29-30. As Barbara Rogers, Hos's Corporate Representative, swore under penalty of perjury:

> On August 17, 2006 Hos Bros. began to mobilize onto Canyon Clock by delivering materials and equipment. ***Hos Bros. commenced work on or about August 21, 2006.*** The August 21, 2006 Superintendent Reports show that Mr. McQueen, an employee of Hos Bros., operated equipment item 400 PC 5770,

> which is a Komatsu 400 Excavator. The Superintendent Report also shows that Mr. Berry, another employee of Hos. Bros., operated equipment item D6 4713, which is a Caterpillar D6 Dozer.

CP 536-37, ¶ 6.

Hos has, in fact, consistently maintained throughout this litigation that mobilization for work began on August 17, 2008, and actual work commenced on August 21, 2006. For example, Hos used the August 2006 dates in its original Complaint. CP 5, ¶ 3.2. The same dates were used in its "Statement of Undisputed Facts" before the Bankruptcy Court. CP 543-44, ¶ 5. Patrick McCourt, the former President of Shotwell, provided a declaration to Hos consistent with these dates. CP 547, ¶ 3. Indeed, the August 2006 date formed the very basis of Hos's Motion for Summary Judgment before the Bankruptcy Court.[13] CP 541.

Hos, after staking out its commencement date in sworn documents and testimony, then discovered that BankFirst had a straightforward priority claim as the senior lien holder under the

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[13] Even in discovery, Hos has maintained that the start of work occurred in August 2006. On January 5, 2009, BankFirst took the deposition of Hos's Rule 30(b)(6) witness, Barbara Rodgers. Ms. Rodgers described August 2006 as the "start of the job." CP 384, 388. Finally, Hos's own attorneys have repeatedly represented that August 2006 is the relevant date for determining priority. For example, Hos submitted a letter from its counsel to BankFirst's counsel representing that Hos's lien ***attached on August 17, 2006***, and that the "[s]uperintendent reports show that Hos Bros. began work ***in August 2006***." CP 390-91.

doctrine of equitable subrogation. *See Bank of America v. Prestance Corp.*, 160 Wn.2d 560, 160 P.3d 17 (2007); RESTATEMENT (THIRD) OF MORTGAGES, § 7.6, pp. 4-8.[14] To try to re-position itself as the first priority creditor, Hos now seeks to back-date its claim of lien to the start of work for an earlier, separate and completed contract.

Under this prior and completed contact, Hos had performed only earthwork on the site. *Compare* CP 323-40 (prior contract for "Earthwork") *with* CP 347-81 (second contract is "General Contractor" contract). Consistent with the titles of the contracts, the scope of work in second contract was substantially different. CP 344. The second contract was monitored by a representative of BankFirst. CP 530, ¶ 10. Payment was handled differently. CP 530, ¶ 12. Even Hos viewed the contracts as separate and distinct:

> Prior to August 2006, Hos Bros. had already been working on the project several months ***under a separate contract.*** Work under that contract was paid for in full, and is not in dispute.

CP 537, ¶ 7.

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[14] At closing, BankFirst advanced $10,350,881.65 to pay off the two prior deeds of trust to refinance the property. CP 396-97. The prior interests were of record on May 12 and April 12, 2006, prior to August 2006. Under *Prestance* and the RESTATEMENT (THIRD) OF MORTGAGES, § 7.6, BankFirst stepped into the shoes of the prior lien holders for purposes of priority.

Hos now claims that it may amend its lien to tack its lien claim under the second (and only relevant) contract onto to an earlier contract that was completed.

Hos is simply wrong on the law:

> In Washington the first performance or delivery date fixes the date of attachment of the lien for all work or material supplied under the contract. ***However, if subsequent work or materials are supplied under a separate contract, the attachment date for that lien is the date of initial performance under the separate contract, not the commencement date of performance under the earlier contract.***

Blum, Brian A., MECHANICS' AND CONSTRUCTION LIENS IN ALASKA, OREGON AND WASHINGTON, § 2.7 (1994) (emphasis added). Hos cannot "lump together" two separate contracts:

> [T]he [mechanics' lien] statute does not refer to intermittent or disconnected operations. To recognize liens for such labor would seriously affect the stability of real estate titles, and result in endless confusion.

Howe v. Myers, 94 Wash. 563, 565-566, 162 P. 1000, 1001 (1917).

Work performed under separate and independent contracts is treated as separate lienable events under the statute. *Anderson v. Taylor*, 55 Wn.2d 215, 217, 347 P.2d 536, 538 (1959); *Swensson v. Carlton*, 17 Wn.2d 396, 404, 135 P.2d 450, 454 (1943). Tacking of contracts is not permitted. *Trane Co. v. Brown-Johnston, Inc.*, 48 Wn.

App. 511, 514, 739 P.2d 737, 739 (1987).[15]

The rationale for the rule against "tacking" applies even when a contractor seeks to combine two separate contracts in order to position itself as the senior lien holder. The mechanics' lien statute was established in order to protect builders and supplies who expend their resources on other's property. *Haselwood v. Bremerton Ice Arena, Inc.*, 137 Wn. App. 872, 887-88, 155 P.3d 952, 960 (2007), *aff'd*, 166 Wn.2d 489, 21 P.3d 308 (2009). The provision permits a claim to "relate back" to the start of work since the builder or supplier cannot record a lien until a bill goes unpaid. *Id.* The "relation back" provision is designed to ensure that contractors get paid for all their unpaid work going back to the start of a contract.

Where a contractor performed work ***and was fully compensated*** under an earlier separate contract, there is no basis for a lien claim under the first contract. The work was done, the contractor paid, and the first contract ended. If, under a subsequent contract, the contractor's bills are unpaid, there is no

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[15] *See also King Equipment Co. v. R. N. & L. Corp.*, 1 Wn. App. 487, 492, 462 P.2d 973, 976 (1969) (supplier cannot tack two separate contracts together to enlarge the lien filing period); 53 AM. JUR. 2D, MECHANIC'S LIENS, § 210 (2008) ("The general rule is that where labor is furnished under separate contracts, the contracts cannot be tacked together so as to enlarge the time for filing a mechanic's lien for what was done under either.").

need to back-date the claim to the start of work under the first contract. The contractor only has unpaid bills—and, therefore, a lien claim—under the second contract. He cannot belatedly claim that his bills were unpaid under the first one.

Here, Hos has no right to claim a lien under the first contract. Hos was paid in full for all the work performed in the first contract. After the work ended and the contract completed, Hos did not file a timely claim of lien. *See* RCW 60.04.091. Any claims Hos may have had under the first contract are gone. *See Standard Lumber Co. v. Fields*, 29 Wn.2d 327, 335, 187 P.2d 28, 2873 (1947) (lien defeated where lien claimant knew that there were two separate contracts, and did not file the lien in time to preserve claims under the first contract).

Hos's attempt to amend its lien by tacking onto an earlier, completed, contract is futile as a matter of law because, as Professor Blum instructs, "the attachment date for that lien is the date of initial performance under the separate contract, not the commencement date of performance under the earlier contract." Blum, Brian A., MECHANICS' AND CONSTRUCTION LIENS IN ALASKA, OREGON AND WASHINGTON, § 2.7 (1994).

V. CONCLUSION

"[T]he exact phraseology of the mechanics' lien statute is of utmost importance." *Dean*, 81 Wn.2d at 220. With the legislature's

1991/1992 amendments, the mechanics' lien statute unambiguously required mechanics' liens to be properly acknowledged.

Hos's lien was not acknowledged. It therefore does not comply with the statute, and was properly invalidated by the trial court. Because an invalid lien cannot be amended into validity, the trial court also properly denied Hos's motion to amend its lien. The trial court's decisions were correct, and should be affirmed.

DATED: December 17, 2010.

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CERTIFICATE OF SERVICE

I certify, under penalty of perjury under the laws of the State of Washington, that on December 17, 2010, a true copy of the foregoing BRIEF OF RESPONDENT BF-THAR, LLC was served upon counsel as indicated below:

Neil A. Dial Colm P. Nelson Jeffrey G. Frank FOSTER PEPPER, PLLC 1111 Third Avenue, Suite 3400 Seattle, WA 98101 *Co-counsel for Hos Bros Construction*	[x] [x]	By United States Mail By Email dialn@foster.com nelco@foster.com fraje@foster.com
Todd C. Hayes HARPER HAYES PLLC 600 University Street, Suite 2420 Seattle, WA 98101 *Co-counsel for Hos Bros Construction*	[x] [x]	By United States Mail By Email todd@harperhayes.com
Joseph E. Shickich, Jr. George E. Frasier RIDDELL WILLIAMS P.S. 1001 Fourth Avenue, Suite 4500 Seattle, WA 98154 *Co-counsel for BF-THAR, LLC*	[x] [x]	By United States Mail By Email jshickich@riddellwilliams.com gfrasier@riddellwilliams.com

DATED: December 17, 2010, at Seattle, Washington.

/s/ Richard E. Spoonemore
Richard E. Spoonemore

APPENDIX INDEX

Respondent BF-THAR's Opening Brief

Appendix A – RCW 60.04.060 (Repealed 1992)

West's RCWA 60.04.060

WEST'S REVISED CODE OF WASHINGTON ANNOTATED
COPR. (c) WEST 1990 No Claim to Orig. Govt. Works
TITLE 60. LIENS
CHAPTER 60.04. **MECHANICS' AND MATERIALMEN'S LIENS**

60. 04. 060. Claim—Contents—Form—Filing—Joinder

No lien created by this chapter shall exist, and no action to enforce the same shall be maintained, unless within ninety days from the date the contributions to any type of employee benefit plan are due, of the cessation of the performance of such labor, the furnishing of such materials, or the supplying of such equipment, a claim for such lien shall be filed for record as hereinafter provided, in the office of the county auditor of the county in which the property, or some part thereof to be affected thereby, is situated. Such claim shall state, as nearly as may be, the date contributions to any type of employee benefit plan became due, the time of the commencement and cessation of performing the labor, furnishing the material, or supplying the equipment, the names of the trustees of the employee benefit plan, the name of the person who performed the labor, furnished the material, or supplied the equipment, the name of the person by whom the laborer was employed (if known), the name of the person required by agreement or otherwise to pay contributions to any type of employee benefit plan, or to whom the material was furnished, or equipment supplied, a description of the property to be charged with the lien sufficient for identification, the name of the owner, or reputed owner if known, and if not known, that fact shall be mentioned, the amount for which the lien is claimed, and shall be signed by the claimant, or by some person in his behalf, and be verified by the oath of the claimant, or some person in his behalf, to the effect that the affiant believes the claim to be just; in case the claim shall have been assigned the name of the assignee shall be stated; and such claim of lien may be amended in case of action brought to foreclose the same, by order of the court, as pleadings may be, insofar as the interests of third parties shall not be affected by such amendment. A claim of lien shall also state the address of the claimant. A claim of lien by trustees of any type of employee benefit plan shall state, as nearly as is known to the trustees, the names of all employees on whose behalf contributions are claimed. A claim for lien substantially in the following form shall be sufficient:

....., claimant, vs. .....

Notice is hereby given that on the ..... day (date of commencement of performing labor or contributions to any type of employee benefit plan became due or furnishing material or supplying equipment) ..... at the request of ..... commenced to perform labor (or to furnish material or supply equipment to be used) upon. (here describe property subject to the lien) of which property the owner, or reputed owner, is ..... (or if the owner or reputed owner is not known, insert the word "unknown"), the performance of which labor (or the furnishing of which material or supply of which equipment) ceased on the ..... day of .....; that said labor performed (the amount of contributions owed or material furnished or equipment supplied) was of the value of ..... dollars, for which labor (or contributions) (or material) (or equipment) the undersigned claims a lien upon the property herein described for the sum of ..... dollars. (In case the claim has been assigned, add the words "and ..... is assignee of said claim", or claims, if several are united.)

..... Claimant

(Address, city, andstate of claimant)

STATE OF WASHINGTON, COUNTY OF ....., ss.

....., being sworn, says: I am the claimant (or attorney of the claimant, or administrator, representative or agent of trustees of an employee benefit plan) above named; I have heard the foregoing claim read and know the contents thereof, and believe the same to be just.

.....
Subscribed and sworn to before me this ..... day of .

.....
Any number of claimants may join in the same claim for the purpose of filing the same and enforcing their liens, but in such case the amount claimed by each original lienor, respectively, shall be stated: *Provided*, It shall not be necessary to insert in the notice of claim of lien provided for by this chapter any itemized statement or bill of particulars of such claim.

1990 Main Volume Credit(s)

Enacted by Laws 1893, ch. 24, § 5. Amended by Laws 1949, ch. 217, § 1(5a); Laws 1959, ch. 279, § 5; Laws 1971, Ex.Sess., ch. 94, § 1, eff. Jan. 1, 1972; Laws 1975, ch. 34, § 6.

HISTORICAL NOTES

HISTORICAL AND STATUTORY NOTES

1990 Main Volume Historical and Statutory Notes

Laws 1959, ch. 279, § 5, made no changes in the section.

Laws 1971, Ex.Sess., ch. 94, § 1, inserted a new third sentence requiring that the claim of lien state the address of the claimant; and made provision for the address in the signature line of the form.

Laws 1975, ch. 34, § 6, in the first sentence, following "date" inserted "the contributions to any type of employee benefit plan are due"; in the second sentence, near the beginning, following "may be" inserted "the date contributions to any type of employee benefit plan became due"; following "equipment" inserted "the name of the person required by agreement or otherwise to pay contributions to any type of employee benefit plan"; inserted a new fourth sentence requiring a claim of lien to state the names of all employees on whose behalf contributions are claimed; and made conforming corrections in the form.

Effective date—Laws 1971, Ex.Sess., ch. 94: "This 1971 amendatory act shall take effect on January 1, 1972." [Laws 1971, Ex.Sess., ch. 94, § 4.]

Source:
RRS § 1134.

West's Revised Code of Washington Annotated

Title 60. Liens (Refs & Annos)
Chapter 60.04. Mechanics' and Materialmen's Liens (Refs & Annos)

West's RCWA 60.04.091

60.04.091. Recording--Time--Contents of lien

Currentness

Every person claiming a lien under RCW 60.04.021 shall file for recording, in the county where the subject property is located, a notice of claim of lien not later than ninety days after the person has ceased to furnish labor, professional services, materials, or equipment or the last date on which employee benefit contributions were due. The notice of claim of lien:

(1) Shall state in substance and effect:

(a) The name, phone number, and address of the claimant;

(b) The first and last date on which the labor, professional services, materials, or equipment was furnished or employee benefit contributions were due;

(c) The name of the person indebted to the claimant;

(d) The street address, legal description, or other description reasonably calculated to identify, for a person familiar with the area, the location of the real property to be charged with the lien;

(e) The name of the owner or reputed owner of the property, if known, and, if not known, that fact shall be stated; and

(f) The principal amount for which the lien is claimed.

(2) Shall be signed by the claimant or some person authorized to act on his or her behalf who shall affirmatively state they have read the notice of claim of lien and believe the notice of claim of lien to be true and correct under penalty of perjury, and shall be acknowledged pursuant to chapter 64.08 RCW. If the lien has been assigned, the name of the assignee shall be stated. Where an action to foreclose the lien has been commenced such notice of claim of lien may be amended as pleadings may be by order of the court insofar as the interests of third parties are not adversely affected by such amendment. A claim of lien substantially in the following form shall be sufficient:

CLAIM OF LIEN

....., claimant, vs ....., name of person indebted to claimant:

Notice is hereby given that the person named below claims a lien pursuant to *chapter 64.04 RCW. In support of this lien the following information is submitted:

1. NAME OF LIEN CLAIMANT: .....

TELEPHONE NUMBER: .....

ADDRESS: .....

2. DATE ON WHICH THE CLAIMANT BEGAN TO PERFORM LABOR, PROVIDE PROFESSIONAL SERVICES, SUPPLY MATERIAL OR EQUIPMENT OR THE DATE ON WHICH EMPLOYEE BENEFIT CONTRIBUTIONS BECAME DUE: .....

3. NAME OF PERSON INDEBTED TO THE CLAIMANT:

.....

4. DESCRIPTION OF THE PROPERTY AGAINST WHICH A LIEN IS CLAIMED (Street address, legal description or other information that will reasonably describe the property): .....

.....

.....

.....

5. NAME OF THE OWNER OR REPUTED OWNER (If not known state "unknown"): .....

6. THE LAST DATE ON WHICH LABOR WAS PERFORMED; PROFESSIONAL SERVICES WERE FURNISHED; CONTRIBUTIONS TO AN EMPLOYEE BENEFIT PLAN WERE DUE; OR MATERIAL, OR EQUIPMENT WAS FURNISHED: .....

.....

7. PRINCIPAL AMOUNT FOR WHICH THE LIEN IS CLAIMED IS: .....

8. IF THE CLAIMANT IS THE ASSIGNEE OF THIS CLAIM SO STATE HERE: .....

.....

....., Claimant

.....

.....

(Phone number, address, city, and state of claimant)

STATE OF WASHINGTON, COUNTY OF

....., ss.

....., being sworn, says: I am the claimant (or attorney of the claimant, or administrator, representative, or agent of the trustees of an employee benefit plan) above named; I have read or heard the foregoing claim, read and know the contents thereof, and believe the same to be true and correct and that the claim of lien is not frivolous and is made with reasonable cause, and is not clearly excessive under penalty of perjury.

.....

Subscribed and sworn to before me this ... day of .....

.....

The period provided for recording the claim of lien is a period of limitation and no action to foreclose a lien shall be maintained unless the claim of lien is filed for recording within the ninety-day period stated. The lien claimant shall give a copy of the claim of lien to the owner or reputed owner by mailing it by certified or registered mail or by personal service within fourteen days of the time the claim of lien is filed for recording. Failure to do so results in a forfeiture of any right the claimant may have to attorneys' fees and costs against the owner under RCW 60.04.181.

Credits

[1992 c 126 § 7; 1991 c 281 § 9.]

Notes of Decisions (73)

Current with all 2010 Legislation

End of Document

S-0167.5

SENATE BILL 5497

State of Washington 52nd Legislature 1991 Regular Session

By Senators McMullen, Matson, Rasmussen, Sellar, McCaslin, Murray and Stratton.

Read first time February 4, 1991. Referred to Committee on Commerce & Labor.

AN ACT Relating to construction liens; amending RCW 19.27.095 and 60.04.230; adding new sections to chapter 60.04 RCW; repealing RCW 60.04.010, 60.04.020, 60.04.030, 60.04.040, 60.04.045, 60.04.050, 60.04.060, 60.04.064, 60.04.067, 60.04.070, 60.04.080, 60.04.090, 60.04.100, 60.04.110, 60.04.115, 60.04.120, 60.04.130, 60.04.140, 60.04.150, 60.04.160, 60.04.170, 60.04.180, 60.04.200, 60.04.210, 60.04.220, 60.20.010, 60.20.020, 60.20.030, 60.20.040, 60.20.050, 60.20.060, 60.48.010, and 60.48.020; prescribing penalties; and providing an effective date.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

NEW SECTION. **Sec. 1.** DEFINITIONS. Unless the context requires otherwise, the definitions in this section apply throughout this chapter.

(1) "Construction agent" means any registered or licensed contractor, registered or licensed subcontractor, architect, engineer,

NEW SECTION. **Sec. 8.** RECORDING--TIME--CONTENTS OF LIEN. Every person claiming a lien under section 2 of this act shall record, in the county where the subject property is located, a notice of claim of lien not later than ninety days after the person has ceased to furnish labor, professional services, materials, or equipment or the last date on which employee benefit contributions were due. The notice of claim of lien:

(1) Shall state in substance and effect:

(a) The name, phone number, and address of the claimant;

(b) The first and last date on which the labor, professional services, materials, or equipment was furnished or employee benefit contributions were due;

(c) The name of the person indebted to the claimant;

(d) The street address, legal description, or other description reasonably calculated to identify, for a person familiar with the area, the location of the real property to be charged with the lien;

(e) The name of the owner or reputed owner of the property, if known, and, if not known, that fact shall be stated; and

(f) The principal amount for which the lien is claimed.

(2) Shall be signed by the claimant or some person authorized to act on his or her behalf who shall affirmatively state they have read the notice of claim of lien and believe the notice of claim of lien to be true and correct under penalty of perjury. If the claim has been assigned, the name of the assignee shall be stated. Where an action to foreclose the lien has been commenced such notice of claim of lien may be amended as pleadings may be by order of the court insofar as the interests of third parties are not adversely affected by such amendment. A claim of lien substantially in the following form shall be sufficient:

....., claimant, vs .., owner or reputed owner

Notice is hereby given that on the ..... day of ..... (date of commencement of furnishing labor, professional services, materials, or equipment and the last date contributions to any type of employee benefit plan became due), ... at the request of ....., ... commenced to (perform labor, furnish professional services, materials, or equipment) upon ..... (here describe property subject to the lien) of which property the owner, or reputed owner, is ..... (or if the owner or reputed owner is not known, insert the word "unknown"), the (furnishing of labor, professional services, materials, or equipment) ceased on the ..... day of .....; that said (labor, professional services, material, or equipment) was of the value of ..... dollars, for which the undersigned claims a lien upon the property herein described for the sum of ..... dollars. (In case the claim has been assigned, add the words "and ..... is assignee of said claim", or claims, if several are united.)

....., Claimant.
.....
.....
(Phone number, address, city, and state of claimant)

STATE OF WASHINGTON, COUNTY OF
.....,ss.
....., being sworn, says: I am the claimant (or attorney of the claimant, or administrator, representative, or agent of the trustees of an employee benefit plan) above named; I have read or heard the foregoing claim, read and know the contents thereof, and believe the same to be true and correct under penalty of perjury.

.....
Subscribed and sworn to before me this ..... day of .....
.....

The period provided for recording the notice is a period of limitation and no action to foreclose a claim of lien shall be maintained unless the notice is recorded within the ninety-day period stated. The lien claimant must give notice of the claim of lien to the owner or reputed owner by certified or registered mail or by personal service within fourteen days of the time the claim is recorded. Failure to do so results in a forfeiture of any right the claimant may have to attorneys' fees and costs against the owner under section 17 of this act.

S-1906.3

SUBSTITUTE SENATE BILL 5497

State of Washington 52nd Legislature 1991 Regular Session

By Senate Committee on Commerce & Labor (originally sponsored by Senators McMullen, Matson, Rasmussen, Sellar, McCaslin, Murray and Stratton).

Read first time March 6, 1991.

AN ACT Relating to construction liens; amending RCW 19.27.095 and 60.04.230; adding new sections to chapter 60.04 RCW; repealing RCW 60.04.010, 60.04.020, 60.04.030, 60.04.040, 60.04.045, 60.04.050, 60.04.060, 60.04.064, 60.04.067, 60.04.070, 60.04.080, 60.04.090, 60.04.100, 60.04.110, 60.04.115, 60.04.120, 60.04.130, 60.04.140, 60.04.150, 60.04.160, 60.04.170, 60.04.180, 60.04.200, 60.04.210, 60.04.220, 60.20.010, 60.20.020, 60.20.030, 60.20.040, 60.20.050, 60.20.060, 60.48.010, and 60.48.020; creating a new section; prescribing penalties; and providing an effective date.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

NEW SECTION. **Sec. 1.** DEFINITIONS. Unless the context requires otherwise, the definitions in this section apply throughout this chapter.

(1) "Construction agent" means any registered or licensed contractor, registered or licensed subcontractor, architect, engineer,

clearly excessive, the court shall issue and order so stating and awarding costs and reasonable attorneys' fees to the lien claimant to be paid by the applicant.

(5) Proceedings under this section shall not affect other rights and remedies available to the parties under this chapter or otherwise.

NEW SECTION. **Sec. 9.** RECORDING--TIME--CONTENTS OF LIEN. Every person claiming a lien under section 2 of this act shall record, in the county where the subject property is located, a notice of claim of lien not later than ninety days after the person has ceased to furnish labor, professional services, materials, or equipment or the last date on which employee benefit contributions were due. The notice of claim of lien:

(1) Shall state in substance and effect:

(a) The name, phone number, and address of the claimant;

(b) The first and last date on which the labor, professional services, materials, or equipment was furnished or employee benefit contributions were due;

(c) The name of the person indebted to the claimant;

(d) The street address, legal description, or other description reasonably calculated to identify, for a person familiar with the area, the location of the real property to be charged with the lien;

(e) The name of the owner or reputed owner of the property, if known, and, if not known, that fact shall be stated; and

(f) The principal amount for which the lien is claimed.

(2) Shall be signed by the claimant or some person authorized to act on his or her behalf who shall affirmatively state they have read the notice of claim of lien and believe the notice of claim of lien to be true and correct under penalty of

perjury. If the claim has been assigned, the name of the assignee shall be stated. Where an action to foreclose the lien has been commenced such notice of claim of lien may be amended as pleadings may be by order of the court insofar as the interests of third parties are not adversely affected by such amendment. A claim of lien substantially in the following form shall be sufficient:

....., claimant, vs .., owner or reputed owner

Notice is hereby given that on the ..... day of ..... (date of commencement of furnishing labor, professional services, materials, or equipment and the last date contributions to any type of employee benefit plan became due), ... at the request of ....., ... commenced to (perform labor, furnish professional services, materials, or equipment) upon ..... (here describe property subject to the lien) of which property the owner, or reputed owner, is ..... (or if the owner or reputed owner is not known, insert the word "unknown"), the (furnishing of labor, professional services, materials, or equipment) ceased on the ..... day of .....; that said (labor, professional services, material, or equipment) was of the value of ..... dollars, for which the undersigned claims a lien upon the property herein described for the sum of ..... dollars. (In case the claim has been assigned, add the words "and ..... is assignee of said claim", or claims, if several are united.)

....., Claimant.
.....
.....
(Phone number, address, city, and state of claimant)

STATE OF WASHINGTON, COUNTY OF
.....,ss.
....., being sworn, says: I am the claimant (or attorney of the claimant, or administrator, representative, or agent of the trustees of an employee benefit plan) above named; I have read or heard the foregoing claim, read and know the contents thereof, and believe the same to be true and correct under penalty of perjury.

.....
Subscribed and sworn to before me this ..... day of .....
.....

The period provided for recording the notice is a period of limitation and no action to foreclose a claim of lien shall be maintained unless the notice is recorded within the ninety-day period stated. The lien claimant must give notice of the claim of lien to the

owner or reputed owner by certified or registered mail or by personal service within fourteen days of the time the claim is recorded. Failure to do so results in a forfeiture of any right the claimant may have to attorneys' fees and costs against the owner under section 18 of this act.

NEW SECTION. **Sec. 10.** SEPARATE RESIDENTIAL UNITS--TIME FOR FILING. When furnishing labor, professional services, materials, or equipment for the construction of two or more separate residential units, the time for filing claims of lien against each separate residential unit shall commence to run upon the cessation of the furnishing of labor, professional services, materials, or equipment on each residential unit, as provided in this chapter. For the purposes of this section a separate residential unit is defined as consisting of one residential structure together with any garages or other outbuildings appurtenant thereto.

NEW SECTION. **Sec. 11.** RECORDING--FEES. The county auditor shall record the notice of claim of lien in the same manner as deeds and other instruments of title are recorded under chapter 65.08 RCW. Notices of claim of lien for registered land need not be recorded in the Torrens register. The county auditor shall charge no higher fee for recording notices of claim of lien than other documents.

NEW SECTION. **Sec. 12.** LIEN--ASSIGNMENT. Any lien or right of lien created by this chapter and the right of action to recover therefor, shall be assignable so as to vest in the assignee all rights and remedies of the assignor, subject to all defenses thereto that might be made.

5497-S AMH CL H2777.1

SSB 5497 - H COMM AMD **ADOPTED 4-10-91**
By Committee on Commerce & Labor

Strike everything after the enacting clause and insert the following:

"NEW SECTION. **Sec. 1.** DEFINITIONS. Unless the context requires otherwise, the definitions in this section apply throughout this chapter.

(1) "Construction agent" means any registered or licensed contractor, registered or licensed subcontractor, architect, engineer, or other person having charge of any improvement to real property, who shall be deemed the agent of the owner for the limited purpose of establishing the lien created by this chapter.

(2) "Contract price" means the amount agreed upon by the contracting parties, or if no amount is agreed upon, then the customary and reasonable charge therefor.

(3) "Draws" means periodic disbursements of interim or construction financing by a lender.

(4) "Furnishing labor, professional services, materials, or equipment" means the performance of any labor or professional services, the contribution owed to any employee benefit plan on account of any labor, the provision of any supplies or materials, and the renting, leasing, or otherwise supplying of equipment for the improvement of real property.

(5) "Improvement" means: (a) Constructing, altering, repairing, remodeling, demolishing, clearing, grading, or filling in, of, to, or upon any real property or street or road in front of or adjoining the

application and order on the lien claimant, and show cause, if any he or she has, why the lien claim should not be dismissed, with prejudice.

(2) The order shall clearly state that if the lien claimant fails to appear at the time and place noted the lien claim shall be dismissed, with prejudice and that the lien claimant shall be ordered to pay the costs requested by the applicant including reasonable attorneys' fees.

(3) If no action to foreclose the lien claim has been filed, the clerk of the court shall assign a cause number to the application and obtain from the applicant a filing fee of thirty-five dollars. If an action has been filed to foreclose the lien claim, the application shall be made a part of that action.

(4) If, following a full hearing on the matter, the court determines that the lien claim is frivolous and made without reasonable cause, or clearly excessive, the court shall issue an order dismissing the lien claim if frivolous or reducing the claim if clearly excessive, and awarding costs and reasonable attorneys' fees to the applicant to be paid by the lien claimant. If the court determines that the claim of lien is not frivolous and made with reasonable cause, and is not clearly excessive, the court shall issue and order so stating and awarding costs and reasonable attorneys' fees to the lien claimant to be paid by the applicant.

(5) Proceedings under this section shall not affect other rights and remedies available to the parties under this chapter or otherwise."

"NEW SECTION. **Sec. 9.** RECORDING--TIME--CONTENTS OF LIEN. Every person claiming a lien under section 2 of this act shall record, in the county where the subject property is located, a notice of claim of lien not later than ninety days after the person has ceased to furnish labor, professional services, materials, or equipment or the last date

on which employee benefit contributions were due. The notice of claim of lien:

(1) Shall state in substance and effect:

(a) The name, phone number, and address of the claimant;

(b) The first and last date on which the labor, professional services, materials, or equipment was furnished or employee benefit contributions were due;

(c) The name of the person indebted to the claimant;

(d) The street address, legal description, or other description reasonably calculated to identify, for a person familiar with the area, the location of the real property to be charged with the lien;

(e) The name of the owner or reputed owner of the property, if known, and, if not known, that fact shall be stated; and

(f) The principal amount for which the lien is claimed.

(2) Shall be signed by the claimant or some person authorized to act on his or her behalf who shall affirmatively state they have read the notice of claim of lien and believe the notice of claim of lien to be true and correct under penalty of perjury, and shall be acknowledged pursuant to chapter 64.08 RCW. If the claim has been assigned, the name of the assignee shall be stated. Where an action to foreclose the lien has been commenced such notice of claim of lien may be amended as pleadings may be by order of the court insofar as the interests of third parties are not adversely affected by such amendment. A claim of lien substantially in the following form shall be sufficient:

..... , claimant, vs .. , owner or reputed owner

Notice is hereby given that on the ..... day of ..... (date of commencement of furnishing labor, professional services, materials, or equipment and the last date contributions to any type of employee benefit plan became due), ... at the request of ....., ... commenced to (perform labor, furnish professional services, materials, or equipment) upon ..... (here describe property subject to the lien) of which property the

owner, or reputed owner, is ..... (or if the owner or reputed owner is not known, insert the word "unknown"), the (furnishing of labor, professional services, materials, or equipment) ceased on the ..... day of .....; that said (labor, professional services, material, or equipment) was of the value of ..... dollars, for which the undersigned claims a lien upon the property herein described for the sum of ..... dollars. (In case the claim has been assigned, add the words "and ..... is assignee of said claim", or claims, if several are united.)

....., Claimant.

.....

.....

(Phone number, address, city,
and state of claimant)

STATE OF WASHINGTON, COUNTY OF
.....,ss.
....., being sworn, says: I am the claimant (or attorney of the claimant, or administrator, representative, or agent of the trustees of an employee benefit plan) above named; I have read or heard the foregoing claim, read and know the contents thereof, and believe the same to be true and correct under penalty of perjury.

.....
Subscribed and sworn to before me this ..... day of .....

.....

The period provided for recording the notice is a period of limitation and no action to foreclose a claim of lien shall be maintained unless the notice is recorded within the ninety-day period stated. The lien claimant shall give notice of the claim of lien to the owner or reputed owner by certified or registered mail or by personal service within fourteen days of the time the claim is recorded. Failure to do so results in a forfeiture of any right the claimant may have to attorneys' fees and costs against the owner under section 18 of this act."

"NEW SECTION. **Sec. 10.** SEPARATE RESIDENTIAL UNITS--TIME FOR FILING. When furnishing labor, professional services, materials, or

OFFICE RECEPTIONIST, CLERK

From: OFFICE RECEPTIONIST, CLERK
Sent: Friday, December 17, 2010 4:48 PM
To: 'Jean Fallow'
Cc: Rick Spoonemore
Subject: RE: FOR FILING - Hos Bros. Construction, Inc. v. C19-1 Shotwell, LLC, et al. - Respondent BF-THAR's Opening Brief

Rec'd 12/17/10

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

From: Jean Fallow [mailto:Jean@sylaw.com]
Sent: Friday, December 17, 2010 4:46 PM
To: OFFICE RECEPTIONIST, CLERK
Cc: Rick Spoonemore
Subject: FOR FILING - Hos Bros. Construction, Inc. v. C19-1 Shotwell, LLC, et al. - Respondent BF-THAR's Opening Brief

Case Name: Hos Bros. Construction, Inc. v. C19-1 Shotwell, LLC, et al.

Case No.: (No. 84764-9)

Attached for filing please find Respondent BF-THAR's Opening Brief, with Appendices A-E. Thank you.

<<Opening Brief-FINAL.pdf>> <<Appendix to Opening Brief.pdf>>

Submitted by:

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WSBA No. 21833
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Sent by:

Jean Fallow

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Tel. (206) 223-0303

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